FILED
DEC 22 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-876

UNITED STATES STEEL CORPORATION,
Petitioner,

vs.

THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, A MUNICIPAL CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

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Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, A MUNICIPAL CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

United States Steel Corporation, petitioner, prays that a writ of certiorari issue to review the decree of the Appellate Court of Illinois, First District,[1] which was filed on June 24, 1975, and became final on September 25, 1975, when the Supreme Court of Illinois denied discretionary review.[2]

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1. Appendix A-1 to A-24.
2. Appendix C-1 to C-2.

OPINION BELOW.

The Circuit Court of Cook County rendered no opinion. The Opinion of the Appellate Court of Illinois, First District, is reported at 30 Ill. App. 3d 360, 332 N. E. 2d 426 (1975).[3] The Supreme Court of Illinois rendered no opinion.

JURISDICTION.

The Appellate Court of Illinois, First District, filed its decree on June 24, 1975,[4] and denied a Petition for Rehearing on July 14, 1975.[5] On September 25, 1975, the Supreme Court of Illinois denied a Petition for Leave to Appeal,[6] thereby making the order of the intermediate appellate court the final decree rendered by the state courts. The jurisdiction of this Court is invoked under Title 28 U. S. C., § 1257(3).[7]

3. Appendix A-1 to A-24.

4. *Ibid.*

5. Appendix B-1.

6. Appendix C-1 to C-2.

7. See *Thompson* v. *Texas-Mexican Railway Co.*, 328 U. S. 134, 66 S. Ct. 937, 90 L. Ed. 1132 (1946); and *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 42 S. Ct. 477, 66 L. Ed 943 (1922).

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QUESTIONS PRESENTED FOR REVIEW.

This is an action by an instrumentality of the State of Illinois, brought in a local court of Illinois, to abate discharges in the State of Indiana directly and indirectly into Lake Michigan, an interstate water of the United States, in the face of a comprehensive federal administrative scheme to regulate the same discharges.

The action was brought by respondent, a local sanitary district created by Illinois statute to treat and dispose of sewage from the Chicago area, to enjoin discharges to Lake Michigan and to the Grand Calumet River, a tributary thereof, from petitioner's steel mill, located in Gary, Indiana.

The state court action is predicated on respondent's purported statutory powers under Ill. Rev. Stat., ch. 42, paras. 326 and 326aa[8] to protect the water supply of municipalities within its boundaries.

The federal administrative proceeding is presently pending before the United States Environmental Protection Agency pursuant to Title 40 C. F. R., § 125.36,[9] and is concerned with the reasonableness and feasibility of limitations to be imposed upon discharges from petitioner's Gary, Indiana, steel mill to the Grand Calumet River and Lake Michigan.

The federal Act requires that such limitations assure compliance with Illinois' and respondent's water quality requirements.[10] The State of Illinois, acting through the Illinois Environmental Protection Agency and representing the interests of the respondent herein, is an active party in the administrative proceeding and has endorsed the terms and conditions proposed by the United States Environmental Protection Agency to the extent

8. Chapter 42 Smith-Hurd Anno. Stats., §§ 326 and 326aa.

9. Appendix D-11.

10. Title 33 U. S. C., §§ 1311(b)(1)(c); 1341(a)(1) and (2); and 1342(b)(5); and Title 40 C. F. R. §§ 125.21(b), 125.23(a)(1)(ii); and 125.41. (Appendix D-3 *et seq.*)

they are consistent with Illinois statutes and regulations. The City of Chicago is also a party to and has participated in this administrative hearing to protect its interest in Lake Michigan as the source of its water supply.

Concurrently with the pending federal administrative proceeding, respondent seeks to have the Circuit Court of Cook County proceed with the determination of the same issues involving the same subject matter through the present independent and uncoordinated judicial proceeding, notwithstanding the "grim prospect" that the outcome of duplicate proceedings may be irreconcilable.[11]

The elaborate program established by Congress for the elimination of all discharges of pollutants to navigable waters by 1985 is gravely imperiled by the State Court's decision sanctioning uncoordinated and inconsistent judicial and administrative determinations of the same complex factual issues.

The questions presented are:

1. Do the Federal Water Pollution Control Act and the Doctrine of Primary Jurisdiction require a state court to defer a state common law and statutory nuisance action for abatement of alleged interstate pollution pending the determination of the same issues by the United States Environmental Protection Agency in an administrative proceeding under the National Pollutant Discharge Elimination System, particularly where the interests represented by the plaintiff in the state court are represented in the administrative proceeding by both the statutorily designated state agency and the city whose water supply is allegedly threatened?

2. Are the purposes of the Federal Water Pollution Control Act thwarted and the constitutional and statutory rights of the petitioner violated by the state court's holding that the issuance of a proposed National Pollutant Discharge Elimination System permit is an admission by the recipient of actionable pollution?

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11. See Appellate Court's Opinion, Appendix A-18 to A-19.

PERTINENT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS.

The pertinent provisions of the Fourteenth Amendment to the United States Constitution; the 1972 Amendments to the Federal Water Pollution Control Act, *viz.*: Title 33 U. S. C., §§ 1311(a) and (b), 1341(a) and (b), 1342(a), (b), and (k), and 1370; and the United States Environmental Protection Agency's Regulations, *viz.*: Title 40 C. F. R. §§ 125.11(a), 125.21(b), 125.23, 125.36, and 125.41, are set forth in Appendix D. A sub-index of these provisions is set forth at Appendix D-1 and D-2.

STATEMENT OF THE CASE.

The respondent, The Metropolitan Sanitary District of Greater Chicago, which exists as an instrumentality of the State of Illinois primarily to treat and dispose of sewage in the Chicago metropolitan area, commenced this action in the Circuit Court of Cook County on March 3, 1970. The Complaint alleges state court jurisdiction under Ill. Rev. Stat., Ch. 42, paras. 326 and 326aa, and seeks to enjoin discharges from petitioner's Gary, Indiana, steel mill to the extent such discharges "[b]ring about or contribute to the pollution of Lake Michigan within the territorial jurisdiction of the District." (R. 10.)[12]

Petitioner filed a pre-trial motion to dismiss or alternatively to stay the state court action pending the completion of an administrative hearing before the United States Environmental Protection Agency (hereafter "federal Agency") with regard to a proposed permit issued by that Agency on October 31, 1974, to petitioner's Gary Works steel mill pursuant to the National Pollutant Discharge Elimination System, which was promulgated by the Federal Water Pollution Control Act Amendments of 1972 (hereafter "federal Act"). (R. 13-16.)[13]

The federal Act makes illegal all discharges from point sources to the waters of the United States except as in compliance with the Act and requires the achievement of effluent limitations based on the application of the best practicable control technology currently available by 1977 and the best available technology economically achievable by 1983, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants by 1985.[14]

12. References to the Record relate to the Record of Proceedings in the Appellate Court of Illinois, First District.

13. Title 33 U. S. C., § 1342 *et seq.*

14. Title 33 U. S. C., § 1311(b). (Appendix D-3.)

The heart of the Act is the National Pollutant Discharge Elimination System which requires a permit for every discharge from a point source into the waters of the United States.[15] The proposed permit issued by the federal Agency to petitioner's Gary Works is a 58-page document imposing discharge limitations on fifteen separate substances and properties (including flow) upon a total of 18 discharge outfalls of the plant, one of the largest integrated steel mills in the country. (R. 62-119.) These discharge limitations were coordinated and balanced by the Agency with limitations imposed on hundreds of industries and municipalities which also discharge into the Grand Calumet River and directly and indirectly into Lake Michigan. The permit requires petitioner to achieve these limitations by constructing a massive treatment system in accordance with a detailed compliance schedule.

Together with the standard permit conditions which establish sampling, measurement, analysis, record keeping, reporting, and management requirements, the limitations imposed by the proposed Gary Works permit constitute an elaborate, interrelated, and interdependent program designed by the federal Agency to assure compliance with all legal requirements of federal and state law, including the protection of waters within respondent's territorial jurisdiction.[16]

Pursuant to the authority granted under the Act, the federal Agency has established detailed procedures for administering the permit program which provide *inter alia* that an adjudicatory hearing with respect to the terms and conditions of a permit may be requested.[17] On November 18, 1974, petitioner requested an administrative proceeding in the form of an adjudicatory hearing with respect to the proposed Gary Works permit on

15. Title 33 U. S. C., § 1342, *et seq.*; and 40 C. F. R., § 125.11. (See Appendix D-7 and D-9, respectively.)

16. Title 33 U. S. C., §§ 1311(b)(1)(c); 1341(a)(1) and (2); and 1342(b)(5); and Title 40 C. F. R., §§ 125.21(b); 125.23(a)(1)(iii); and 125.41. (Appendix D-3 *et seq.*)

17. Title 40 C. F. R. § 125.36. (Appendix D-11.)

the grounds that certain terms and conditions of the permit issued to Gary Works were technologically and economically unreasonable and infeasible. (R. 14.)

The factual issues to be determined as the result of this adjudicatory hearing include all the issues raised in the instant case, including the nature of defendant's discharges, the alleged impact of Gary Works' discharges upon water quality within respondent's alleged territorial jurisdiction, the abatement facilities necessary to assure compliance with applicable water quality requirements, and a compliance schedule for the construction of an abatement system. (R. 13-15; and 259-260.)

On February 10, 1975, the State of Illinois, acting through the Illinois Environmental Protection Agency and representing the respondent herein, a political subdivision of the State of Illinois, became a party to the Gary Works adjudicatory hearing. (R. 242-247.) Illinois' amended motion to intervene[18] states that:

> ". . . it must be made a party [to the adjudicatory hearing] to protect the rights of the citizens of Illinois to use and enjoy waters of the State.
>
> * * * * *
>
> The [Illinois Environmental Protection] Agency endorses standards, sampling procedures, and schedules of compliance to be set forth in the [Gary Works permit] so long as they are consistent with the levels set forth in Chapter 3, Pollution Control Board Regulations, and as such carry out the intendment of Sections 402 and 510 of the Federal Water Pollution Act Amendments of 1972." (Bracketed material added.)

In its Supplement to Statement of Issues, Illinois specifically raised the issue whether the discharge limitations contained in the proposed Gary Works permit are:

> ". . . consistent with the Illinois standards contained in Chapter 3, Water Pollution Regulations of the Illinois

18. The original Motion to Intervene was amended on April 1 and 11, 1975, and again on July 25, 1975.

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Pollution Control Board and the Illinois Environmental Protection Act."

The City of Chicago's Department of Water and Sewers, the agency responsible for supplying water to the metropolitan area, the State of Indiana, and various private groups and individuals have also joined as parties to the Gary Works federal administrative proceeding. (R. 224-225.)

The United States Environmental Protection Agency conducted an extensive evidentiary hearing from August 5 through 22, 1975. The record, including proposed findings of fact and conclusions of law, having been certified by the Administrative Law Judge, is now pending before the Agency's Regional Administrator, who in turn is required to issue the Agency's initial decision. If any party is dissatisfied with this ruling, an appeal may be taken to the Agency's Administrator, whose action constitutes final administrative action.[19] It is not known presently when the administrative process will be completed.

Gary Works' National Pollutant Discharge Elimination System permit, in its present form or as it may be modified in the pending administrative proceeding, will be legally binding upon the Company and its responsible corporate officials. Violations of its terms can result in cease and desist orders, injunctions, civil penalties of $10,000 per day, criminal penalties of $25,000 per day, jail sentences of up to a year for the first violation, and the loss of the right to discharge any water whatsoever.[20]

On the same date it filed its request for the federal administrative hearing, petitioner also filed a verified pre-trial motion to dismiss or in the alternative to stay the state court action on the basis of the pendency of the federal administrative proceeding. (R. 13-16.) In its trial court brief, petitioner summarized the federal questions as follows:

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19. Title 40 C. F. R., § 125.36. (Appendix D.)
20. Title 33 U. S. C., § 1319.

"Piece-meal resolution of the intricate and complex scientific, technical, and factual questions by different, unrelated, and independent judicial decision-makers would necessarily subvert, if not destroy the object and purposes of the Act to restore harmony to the environment. (R. 37.)

* * * * *

Congress created (the United States Environmental Protection Agency) with the technical, scientific, economic, and legal tools to control water pollution. The Act cannot be construed as to render this body superfluous. (R. 38.)

* * * * *

For this Court to proceed simultaneously with the administrative proceedings would defeat the purpose of . . . the federal Act. . . . As to this defendant, moreover, it would subject it to the substantial risk of inconsistent and conflicting adjudications as well as multiple and unnecessary proceedings, thereby depriving defendant of Due Process as guaranteed by the Fourteenth Amendment of the United States Constitution. . . ." (R. 42.)

On January 24, 1975, the trial court denied defendant's motion to dismiss or alternatively to stay, but certified that this issue presented a "substantial ground for difference of opinion and (that) an immediate appeal with respect thereto may materially advance the ultimate termination of litigation in this case." (R. 188-190.)

On February 7, 1975, defendant filed Notice of Interlocutory Appeal as of Right[21] to the Appellate Court of Illinois, First District, and raised the same federal questions in its Brief and Reply Brief. (R. 214-281.)

On June 24, 1975, the Appellate Court of Illinois, First District, filed its Opinion affirming the trial court's Order[22] notwithstanding:

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21. Rules of the Supreme Court of Illinois, Ch. 110A Smith-Hurd Anno. Stats., Rule 307.

22. Appellate Court's Opinion, Appendix A-22.

> ". . . the grim prospect of the possibility of irreconcilable differences or the pressing need for primary administrative determination."[23]

On July 14, 1975, the Appellate Court denied a Petition for Rehearing.[24]

On August 18, 1975, petitioner filed a Petition for Leave to Appeal to the Supreme Court of Illinois.[25] The Illinois Supreme Court denied Leave to Appeal on September 25, 1975,[26] making the intermediate court's decree the final decree of the Illinois courts.

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23. *Ibid.* at A-18 to A-19.

24. Rules of the Supreme Court of Illinois, Ch. 110A Smith-Hurd Anno. Stats., Rule 367; Appellate Court's Order Denying Petition for Rehearing, Appendix B-1.

25. Rules of the Supreme Court of Illinois, Ch. 110A, Smith-Hurd Anno. Stats., Rule 315.

26. Appendix C-1 to C-2.

REASONS FOR GRANTING WRIT.

This case presents a critical issue of national importance not previously decided by this Court which must be resolved now to prevent the subversion of the federal program for the elimination of water pollution. The state court's decision gravely imperils this program created by the Federal Water Pollution Control Act Amendments of 1972,[27] and is in conflict with numerous decisions of this Court applying the Doctrine of Primary Jurisdiction.

I.

THE FEDERAL ACT WAS INTENDED BY CONGRESS TO ESTABLISH A COMPREHENSIVE REGULATORY PROGRAM MARKED BY "UNIFORMITY, FINALITY, AND ENFORCEABILITY" WHICH IS COMPLETELY DISRUPTED BY THE DECISION BELOW.

In introducing the Conference Report on the Federal Act to the United States Senate, Senator Edmund Muskie stated that there are

> ". . . three essential elements to (the Federal Water Pollution Control Act Amendments of 1972): Uniformity, finality, and enforceability. Without these elements a new law would not constitute any improvement on the old; we would not bring a conference agreement to the floor without them."[28]

Uniformity, finality, and enforceability are established by the federal Act through the National Pollution Discharge Elimination System permit program. Senator Muskie explained:

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27. Title 33 U. S. C., 1342 *et seq.*

28. See the remarks of Senator Edmund Muskie, United States Senate's Consideration of the Report of the Conference Committee, October 4, 1972, 93 Cong., 1st Sess., reported in "A Legislative History of the Water Pollution Control Act Amendments of 1972," U. S. Government Printing Office, Washington: 1973 (Vol. 1, Serial No. 93-1, Stock No. 5270-01759, pp. 162-163).

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> "[T]he Administrator [of the federal permit program] has the responsibility to determine the effluent limitations to be applied to each category or class of polluter, *to set forth those limitations in a permit issued pursuant to Section 402 of the Act (33 U. S. C., § 1342)* and to enforce those limitations through the provisions of Section 309 (Title 33 U. S. C., § 1319).[29] (Emphasis and bracketed material supplied.)

While Congress recognized the authority of the states and required permits issued under the federal program to assure compliance with state water quality requirements,[30] it clearly established that the Federal Water Pollution Control Act constitutes a comprehensive program for the elimination of water pollution. How this national program is reconciled with rights reserved to the states is the question presented to the Court.

The United States Environmental Protection Agency has commenced administrative proceedings with regard to the identical factual issues to be decided by the trial court in the case at bar. The decision below holds that, notwithstanding the pendency of the administrative proceeding, the state court may proceed with trial and enjoin petitioner's discharges in total disregard of the federal program and irrespective of conflicts between the state judicial and federal administrative proceedings.

Such a course not only jeopardizes the federal program as applied to petitioner's Gary Works, it undermines the tens of thousands of National Pollutant Discharge Elimination System permits issued during the past year throughout the United States for facilities which are or may become subject to similar uncoordinated state or municipal judicial actions.

Petitioner's Gary Works, for example, is presently subject to three judicial actions, in addition to the one involved in this proceeding, as well as a state administrative proceeding, each

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29. *Ibid.*

30. Title 33 U. S. C., §§ 1311(b)(1)(c); 1341(a)(1) and (2); and 1342(b)(5); and Title 40 C. F. R., §§ 125.21(b), 125.23(a)(1)(iii), and 125.41 (See Appendix D-3 *et seq.*)

involving essentially the same issues and subject matter as the administrative proceeding pending before the United States Environmental Protection Agency.[13] Clearly, there must be an accommodation between the federal Act and the rights of states and their instrumentalities to control water pollution through local proceedings.

This Court has developed the Doctrine of Primary jurisdiction to resolve the conflict of jurisdiction between administrative agencies vested by Congress with specific responsibilities and disparate judicial action in relation to the same subject matter. The Doctrine of Primary Jurisdiction provides an ideal

> ". . . mode of accommodating the complementary roles of the courts and administrative agencies in the enforcement of law. . . ." *Far East Conference* v. *United States*, 342 U.S. 570, 575, 72 S.Ct. 492, 96 L.Ed. 576 (1952).

The fate of the Federal Water Pollution Control Act and the National Pollutant Discharge Elimination System is dependent upon this Court's recognition of the United States Environmental Protection Agency's primary jurisdiction.

This case is appropriately before this Court on Petition for Writ of Certiorari. As in *Far East Conference* v. *United States, supra*, the appropriate time to accommodate the role of the federal Agency, on the one hand, and the roles of states and the courts, on the other hand, is in advance of trial to avoid needless waste of judicial time, to afford the courts the benefit of the Agency's expertise, and to eliminate conflict between judicial and administrative proceedings. The com-

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31. *United States of America* v. *United States Steel Corp.*, United States District Court for the Northern District of Indiana (Hammond Division), Docket No. 71 H 52; *Indiana Stream Pollution Control Board* v. *United States Steel Corp.*, United States District Court for the Northern District of Indiana (Hammond Division), Docket No. 73 H 190; *People of the State of Illinois* v. *United States Steel Corp.*, Circuit Court of Cook County, Docket No. 72 CH 258; and *Indiana Stream Pollution Control Board* v. *United States Steel Corp.*, Indiana Stream Pollution Control Board, Docket No. B-82.

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plaint below does not present any need for immediate relief which cannot await the outcome of the federal administrative proceeding. Respondent has not alleged irreparable harm or requested an interlocutory injunction and has allowed almost six years to elapse without having advanced the case to a point where even any significant discovery has occurred.

II.

THIS COURT MUST INVOKE THE DOCTRINE OF PRIMARY JURISDICTION TO PROTECT THE INTEGRITY OF THE FEDERAL WATER POLLUTION CONTROL ACT.

The Doctrine of Primary Jurisdiction was explained in *United States* v. *Western Pacific Railroad Co.*, 352 U. S. 59, 63-64, 77 S. Ct. 161, 1 L. Ed. 2d 126 (1956) as follows:

> " '[P]rimary jurisdiction' . . . , applies where a claim is originally cognizable in the court, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." (352 U. S. at 64.)

The Federal Water Pollution Control Act specifically requires the United States Environmental Protection Agency to make findings of fact which go to the essence of the present judicial action: *viz.*: whether or not the limitations imposed on Gary Works' discharges to the Grand Calumet River and Lake Michigan assure compliance with Illinois' water quality standards and respondent's professed concern.[32] The uncontroverted affidavit in support of petitioner's motion to dismiss or in the alternative to stay establishes that the factual issues and the subject matter of the pending administrative proceeding and the present action are the same. (R. 15.)

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32. See Title 33 U. S. C., §§ 1311(b)(1)(c); 1341(a)(1) and (2); and 1342(b)(5); and Title 40 C. F. R., §§ 125.21(b); 125.23 (a)(1)(iii); and 125.41. (See Appendix D-3 *et seq.*)

In *United States* v. *Western Pacific Railroad Co., supra,* the Court stated:

> "No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the purposes it serves will be aided by its application in the particular litigation. The reasons and purposes have often been given expression by this Court." (352 U. S. at 64.)

The purposes served by the Doctrine are manifest in the present situation. Coordination of the roles of courts and the federal Agency, the need for consistency in the determination of complex factual issues, and the benefit to be afforded by administrative skill and expertise require this Court to recognize the United States Environmental Protection Agency's primary jurisdiction.

A. The Federal Water Pollution Control Act and the Doctrine of Primary Jurisdiction Require Orderly and Sensible Coordination of the Roles of the Judiciary and of Administrative Agencies.[33]

The Federal Water Pollution Control Act's elaborate and ambitious program to eliminate all discharges to navigable waters by 1985 will be defeated unless the chaotic rivalry between local courts and the federal Agency is overcome and state court actions are dismissed or stayed pending completion of the Agency's fact-finding process. Such coordination is especially important in the present action, where the courts of one state are asked by an instrumentality of that state to control discharges in a neighboring state and where the interests of the parties to the judicial action are represented in the administrative proceeding.

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33. See *United States* v. *Western Pacific Railroad Co., supra;* and *Far East Conference* v. *United States, supra.*

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B. The Federal Water Pollution Control Act and the Doctrine of Primary Jurisdiction Require Uniformity and Consistency in the Initial Determination of Factual Issues.[34]

The efficacy of the federal Act and the country's needs and fair expectations of uniform and coherent administrative interpretation of factual issues require recognition of the United States Environmental Protection Agency's primary jurisdiction. If the state court and Federal agency were to require the construction of separate, incompatible pollution abatement systems, the federal Agency's extensive program for the control of discharges would be destroyed.

Neither this petitioner nor any other discharger can proceed with any confidence to construct facilities and otherwise take action to comply with a federal permit when confronted with the spectre of state court action mandating an incompatible program. For example, at the point of Petitioner's discharges to the Grand Calumet River there is no significant source of water other than those discharges. The federal permit issued to Gary Works is based largely on "once-through" treatment of discharges which would maintain the flow in the River. If the trial court granted respondent's demands in the instant case, it is likely to require recycling of waste water, which would all but eliminate the flow of water in the Grand Calumet River with substantially adverse effects to the City of Gary's sewage treatment process, which discharges to the same river downstream, and consequent adverse effects upon public health.

Consequently, the inevitable difference in orientation between the trial court, concerned only with effects upon water quality from the standpoint of respondent's limited perspective, and the federal Agency would defeat the federal Agency's complex and comprehensive abatement program for all industries and munici-

34. See *Texas and Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 440, 27 S. Ct. 350, 51 L. Ed. 553 (1906); and *Pennsylvania Railroad Co.* v. *Day*, 360 U. S. 548, 552, 79 S. Ct. 1322, 3 L. Ed. 2d 1422 (1958).

palities located in the Grand Calumet River basin and the southeastern end of Lake Michigan.

C. The Federal Water Pollution Control Act and the Doctrine of Primary Jurisdiction Preclude the State Court from Ignoring the United States Environmental Protection Agency's Administrative Expertise.[35]

Congress established the federal Agency to determine intricate, complex, and voluminous scientific, technological, and economic facts with regard to pollution abatement. Unlike the trial court, the Agency handles these matters on a regular basis and has the staff, resources, laboratories, and facilities to resolve the factual issues. The purpose and the effectiveness of the federal Agency and the procedures established by Congress are defeated if local courts are permitted to disregard the benefit of the Agency's expertise.

D. The Federal Water Pollution Control Act and the Doctrine of Primary Jurisdiction Required the State Court to Dismiss or Stay the Present Action.

Application of Primary jurisdiction is not discretionary. In *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 448, 27 S. Ct. 350, 51 L. Ed. 553 (1906), this Court held that, while the state court there might have had jurisdiction, it was without power to have proceeded, because the plaintiff:

> "*must* . . . invoke redress through the Interstate Commerce Commission which body *alone* is vested with power originally to entertain these proceedings." (204 U. S. at 448) (Emphasis supplied.)

In each of the following cases, the trial court was similarly reversed for having failed to invoke Primary Jurisdiction: *United*

35. See *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291, 42 S. Ct. 477, 66 L. Ed. 943 (1922).

States v. *Western Pacific Railroad Co., supra; Far East Conference* v. *United States, supra; Thompson* v. *Texas-Mexican Railway Co.*, 328 U. S. 134, 66 S. Ct., 937, 900 L. Ed. 1132 (1946); and *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, 60 S. Ct. 325, 84 L. Ed. 361 (1940).

III.

THE STATE COURT'S DECISION MISINTERPRETS THE DOCTRINE OF PRIMARY JURISDICTION AND MISCONSTRUES THE FEDERAL WATER POLLUTION CONTROL ACT.

A. Contrary to the State Court's Decision, the Doctrine of Primary Jurisdiction Does Apply Where the Court and the Agency Seek to Attain the Same Objectives by Different Methods.

The state court found that the objective of both the judicial and administrative proceedings is the same, *viz.*, the attainment of an unpolluted water supply, but held that Primary Jurisdiction does not apply because the federal Agency seeks to attain this objective through "permissive" regulation whereas the trial court is concerned with injunctive relief and "total abatement."[36]

If the administrative and judicial tribunals were to approach the issue from entirely different points of view and employ entirely different remedies, that would be a fundamental reason *requiring* application of the Doctrine of Primary Jurisdiction, not a reason *precluding* its application. As discussed above on page 17, *supra*, one of the principal purposes served by the Doctrine is avoidance of conflicting factual determinations resulting from wholly independent, unrelated, and uncoordinated judicial and administrative proceedings.[37]

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36. Appellate Court Opinion, Appendix A-12 to A-14.

37. See *Texas and Pacific Railway Co.* v. *Abilene Cotton Oil Co., supra;* and *Pennsylvania Railroad Co.* v. *Day, supra.*

This Court has frequently held that Primary Jurisdiction applies even though the agency lacks jurisdiction to grant the relief sought in the judicial action.[38] The state court's decision that Primary Jurisdiction is inapplicable because regulation is the subject of the administrative proceeding and injunctive relief is the subject of the judicial action is contrary to every judicial decision on the question.

B. Recognition of the United States Environmental Protection Agency's Primary Jurisdiction Would Not Conflict with Any Rights of Respondent Preserved by the Federal Water Pollution Control Act.

The state court seriously misconstrued the Federal Water Pollution Control Act by holding that recognition of the Agency's primary jurisdiction would conflict with respondent's rights under the Act to enforce more stringent water quality requirements.[39]

If respondent were truly concerned with enforcing more stringent standards, the Federal Water Pollution Control Act establishes the appropriate mechanism. The federal Act requires that terms and conditions of the Permit issued to Gary Works assure compliance with Illinois' and respondent's water quality requirements and establishes the procedure by which interested persons, including respondent, can join the proceeding to protect their interests.

The respondent was created by statute as an instrumentality of the State of Illinois and is fully represented in the adjudicatory hearing by the agency designated by the legislature to represent the interests of the State and its citizens in such proceedings. The respondent did not elect to participate itself, as

38. See *Far East Conference* v. *United States, supra; Thompson* v. *Texas-Mexican Railway Co., supra; and General American Tank Car Co.* v. *Dorado Terminal Co., supra.*

39. Appellate Court Opinion, Appendix A-14.

it clearly had the right to do, notwithstanding the fact that the time for intervention as of right did not elapse until almost three months after Petitioner's motion was filed in the trial court. The application of Primary Jurisdiction could not, therefore violate or preempt any right of respondent to enforce more stringent water quality requirements.

Moreover, contrary to the decision below, since respondent alleges pollution across interstate boundaries, the federal Act does not preserve any rights which could be violated or preempted by Primary Jurisdiction. As this Court held in *Illinois* v. *City of Milwaukee*, 406 U. S. 91, 102, 31 L. Ed. 2d 712, 92A S. Ct. 1385 (1972):

> "The (Federal Water Pollution Control) Act makes clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters." (406 U. S. at 102.)
>
> * * * * *
>
> "[W]here there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law. (Citing cases). Certainly, these same demands for applying federal law are present in the pollution of a body of water such as Lake Michigan bounded, as it is, by four states." (406 U. S. at n. 6.)

The Court explained that the pollution of interstate water, like the apportionment of interstate waters,

> "(presents) question(s) of federal common law upon which state statutes and decisions are not conclusive." (406 U. S. at 105.)

Of course, the case at bar was not brought under "federal common law" but, in fact, is an action predicated upon state law. Therefore, contrary to the state court's decision the federal Act does not preserve any rights in a local sanitary district to enforce its local water quality standards against discharges which occur in a neighboring state.

Contrary to the state court's interpretation of Title 33 U. S. C. § 1370 (see Appendix, D-9), even if that section preserved some right in respondent, Primary Jurisdiction would nevertheless be applicable. In *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co., supra,* the case establishing the Doctrine, the Interstate Commerce Act provided that:

> "Nothing contained in this act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." (204 U. S. at 446.)

Notwithstanding the express statutory preservation of state rights and remedies, this Court invoked the primary jurisdiction of the Interstate Commerce Commission and required a shipper who had brought a state common law action against the railroad to seek initial redress through the agency.[40]

C. The State Court's Interpretation of the Federal Water Pollution Control Act Seriously Misconstrues the Federal Act and Violates Due Process of Law.

The Appellate Court's Opinion states:

> "The adjudicatory hearings before the federal agency will be concerned with a permit which expressly approves and validates continued pollution of the water supply until its expiration date of July 31, 1979. (A-13).
>
> * * * * *
>
> "Plaintiff's complaint presents a rather simple subject; namely that the operation of defendant's plant has severely fouled and polluted the water of Lake Michigan. This basic fact is virtually conceded by defendant which has obtained and relied upon a permit from the United States Environmental Protection Agency. This document is, in effect, an admission of present water pollution by defendant's plant and a license to continue this pollution in varying degrees for a number of years." (A-23.)

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40. Also see *Mitchell Coal & Coke Co.* v. *Pennsylvania Railway Co.*, 230 U. S. 247, 33 S. Ct. 916, 57 L. Ed. 1472 (1913).

The state court's conclusion that a permit to discharge is *ipso facto* legally conclusive evidence of pollution of the water supply is totally unfounded and nonsensical. It should first be made clear that there was no factual evidence before the lower court with regard to the character of the petitioner's discharges or the water quality of Lake Michigan or any other body of water and that the water supply to which the court refers is fifteen miles away across open Lake waters from petitioner's plant.

The proposed permit for Gary Works merely authorizes petitioner to discharge and prescribes maximum effluent limitations. Contrary to the state court's construction of the federal Act, issuance of a permit is not evidence of the character of discharges or of any adverse effect upon water quality. A proposed National Pollutant Discharge Elimination System permit is not a license to pollute and does not represent the Federal Agency's approval or validation of continued pollution. In fact, the federal Act provides that compliance with a permit shall be deemed compliance with federal law.[41] Federal law requires that a permit will "insure compliance with applicable water quality requirements" of all affected states. 33 USC § 1341 (a)(2). (See Appendix D-6.)

The state court's misinterpretation of the federal permit program distorts the purpose and meaning of the Federal Water Pollution Control Act and seriously threatens the effectiveness of the National Pollutant Discharge Elimination System. Each discharger to the waters of the United States is required to possess a federal permit. If issuance of such a permit is tantamount in law to establishment of actionable pollution, a federal permit will be no more than an open invitation to all to institute separate and conflicting abatement actions and would compel every discharger in the country to challenge the federal permit program in self defense. The uniformity, finality, and enforceability sought by Congress could never be achieved

41. Title 33 U. S. C. § 1342(k). (Appendix D-8.)

and the national program to improve water quality would be reduced to chaos.[42]

Tens of thousands of National Pollutant Discharge Elimination System permits have been issued by the United States Environmental Protection Agency throughout the country. The state court's misconstruction of this federal program deprives petitioner and all others who have received permits under the federal Act of Due Process of Law under the Fourteenth Amendment to the United States Constitution.[43]

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42. See remarks of Senator Edmund Muskie, Senate Consideration of the Report of the Conference Committee, October 4, 1972, as reported in "A Legislative History of the Water Pollution Control Act Amendments of 1972," U. S. Government Printing Office, Washington: 1973 (Vol. 1, Serial No. 93-1, Stock No. 5270-01759, pp. 162-163). (*Supra*, p. 12.)

43. See *Marchetti* v. *United States*, 390 U. S. 39, 88 S. Ct. 697, 19 L. Ed. 2d 889 (1968); *Grosso* v. *United States*, 390 U. S. 62, 88 S. Ct. 709, 19 L. Ed. 2d 906 (1968); and *Haynes* v. *United States*, 390 U. S. 85, 88 S. Ct. 722, 19 L. Ed. 2d 923 (1968). Title 28 U. S. C. § 2403, which requires the Court to certify to the Attorney General that the constitutionality of an Act of Congress is drawn in question, may be applicable. Such certification has not been previously made. In view of the ruling below *vis a vis* the cases cited above, petitioner has complied with Supreme Court Rule 33(2)(b) by serving this Petition upon the Solicitor General.

BLEED THROUGH

IV. CONCLUSION.

The state court's decision denying the relationship between an administrative proceeding under the Federal Water Pollution Control Act and a local state court action alleging water pollution across state boundaries is a determination of a substantial federal question of paramount importance not previously decided by this Court or any other federal court. The basis upon which the state court decided this important federal question seriously impairs the federal program and is directly contrary to the numerous decisions of this Court applying the Doctrine of Primary Jurisdiction.

Congress' elaborate and ambitious program to eliminate all discharges to navigable waters by 1985 is largely dependent on the outcome of the issues raised by this Petition. The goals of the federal Act are doomed if local courts blindly attempt to resolve factual issues without regard for the determination of the same issues by the United States Environmental Protection Agency and construe federal permits as conclusive evidence of actionable pollution.

This Court must clarify whether a state court may proceed with the trial of an action by a state, or political subdivision of a state, prior to completion of proceedings before the United States Environmental Protection Agency involving the same issues and subject matter, or indeed, proceed with such a trial at all, in these circumstances. If this Court does not correct the gross misconstruction of the Federal Act, serious and irreparable damage will be done to the federal program.

This Court should not countenance a state court:

> ". . . remain(ing) undaunted by the grim prospect of the possibility of irreconcilable differences or the pressing need for primary administrative determination." (A-18 to A-19.)

The state court's misconstruction of the federal Act and Regulations and its authorization of duplicative and disparate proceedings deprive petitioner and all other recipients of National Pollutant Discharge Elimination System permits of Due Process of Law.

Regardless of the ultimate decision on the issues here presented, the relationship of state court proceedings to the federal Act and the legal import of a federal permit is a matter of national importance which requires immediate resolution. This Court therefore is respectfully urged to grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A.

OPINION OF THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

The Metropolitan Sanitary District of Greater Chicago, Plaintiff-Appellee v. *United States Steel Corporation, Defendant-Appellant,* Docket No. 61503 (30 Ill. App. 3d 360, 332 N. E. 2d 426, June 24, 1975).

MR. JUSTICE GOLDBERG delivered the opinion of the court:

This record brings before us proceedings brought by the Metropolitan Sanitary District of Greater Chicago (plaintiff) against United States Steel Corporation (defendant) concerned with pollution of the water of Lake Michigan by the defendant. Defendant made a motion in the trial court to dismiss or alternatively to stay the proceedings. Upon denial of the motion, defendant filed an interlocutory appeal. Supreme Court Rule 307, Ill. Rev. Stat. 1973, ch. 110A, Rule 307.

Our first concern was a determination of the jurisdiction of this court to hear an interlocutory appeal from the order denying a stay of the proceedings. (*In re Org. of Fox Valley Comm. Airport Auth.*, 23 Ill. App. 3d 168, 318 N. E. 2d 496.) Special memoranda upon this point prepared and furnished at our request by able counsel for both sides have convinced us that we do have jurisdiction for determination of this interlocutory appeal. *Bohn Aluminum & Brass Co.* v. *Barker*, 55 Ill. 2d 177, 180, 181, 303 N. E. 2d 1.

In this court defendant contends generally that the trial court should have stayed the action pending completion of administrative proceedings before the United States Environmental Protection Agency which allegedly involve the same subject matter and

issues and require the resolution of identical factual questions. This contention is based upon the doctrines of primary jurisdiction and exhaustion of administrative remedies. In response, plaintiff takes the position that these doctrines are not applicable here and may not defeat the power of the trial court to hear and fully resolve a nuisance action without resorting to prior hearings before the federal administrative agency.

The present proceedings commenced with the filing of plaintiff's complaint predicated upon the Illinois statute giving plaintiff specific power and authority to prevent pollution of any waters from which a water supply may be obtained by any city, town or village within the District. (Ill. Rev. Stat. 1973, ch. 42, par. 326aa.) The theory expressed in plaintiff's complaint is that the operations conducted by defendant in the manufacturing and processing of steel and steel products at the southern end of Lake Michigan in close proximity to Gary, Indiana, use noxious chemical substances and fluids which severely and grossly contaminate the effluents that are discharged by the plant either directly into Lake Michigan or into the Grand Calumet River which flows into the Lake. Plaintiff also alleged that as a result the water at the southern end of Lake Michigan has been severely fouled and polluted to the injury and detriment of the water quality and ecology of the Lake thus causing grave danger and immediate threat to the health and safety of the population within plaintiff District. The complaint prayed an injunction restraining the continuation of this pollution. It is also plaintiff's theory, as expressed in its brief, that plaintiff is acting in accordance with common law principles to enjoin pollution of public water supplies which constitutes a common law nuisance.

Defendant filed a supplementary motion verified by affidavit seeking to dismiss or alternatively to stay the proceedings. This motion set forth that on October 31, 1974, a permit had been

issued to defendant under the National Pollutant Discharge Elimination System. On November 18, 1974, a request was filed by defendant with the United States Environmental Protection Agency for an adjudicatory hearing with respect to said permit.

The motion further recited that plaintiff was authorized to join and participate in said adjudicatory hearing. It alleged that the federal agency is required to make the same factual determinations, involving complex and intricate scientific, technological and economic questions, as were presented to the trial court in this cause. It alleged that the problem of the water quality of Lake Michigan involves hundreds of persons and entities and therefore coordinated and coherent solutions were required. It was, therefore, urged that the trial court should invoke the primary jurisdiction of the federal agency and require plaintiff to exhaust its administrative remedies.

Exhaustive briefs were filed by the parties in the trial court, including the citation of numerous legal authorities. Among other matters a copy of the federal permit issued by the Environmental Protection Agency is appended to defendant's material. The permit is a 58 page document setting forth effluent limitations, monitoring requirements and numerous other detailed and highly technical conditions referring to discharges by defendant from its facility in Gary, Indiana into the Grand Calumet River and Lake Michigan.

After hearing oral argument, the trial court entered an order describing the impending adjudicatory hearing upon the administrative permit and finding that the pendency of this hearing did not require a stay or dismissal of plaintiff's action by reason of the doctrines of primary jurisdiction or exhaustion of remedies and that denial of defendant's motion for stay or dismissal would not violate its rights to due process of law or other specified legal principles. The order also recited the pendency of similar

proceedings against defendant brought by the United States of America in the United States District Court for the Northern District of Indiana, Hammond Division, and by the State of Illinois in the circuit court of Cook County, both of which charge defendant with discharging pollutants and contaminants into water adjacent to its Gary operation which allegedly reach Illinois waters within the jurisdiction of the State of Illinois, and of the plaintiff in the instant case. The order further found that plaintiff was entitled to maintain its action for injunction as filed which sought to enjoin a common law nuisance or a nuisance under statutory description. (Ill. Rev. Stat. 1973, ch. 42, pars. 326 and 326aa.) The court accordingly denied defendant's motion to stay or alternatively to dismiss the action.

For the sake of completeness, we note that in this same order the trial court certified the existence of certain issues of law raised in the cause concerning which there was substantial ground for difference of opinion and that an immediate appeal concerning the same might materially advance the ultimate termination of the litigation. S. Ct. R. 308, Ill. Rev. Stat. 1973, ch. 110A, R. 308.

On February 7, 1974, defendant filed in this court an application for leave to appeal pursuant to Rule 308. (General No. 61457.) This application was later amended; objections thereto were filed by plaintiff and defendant replied to these objections. The fifth division of this court granted defendant's motion for oral argument on this application which was heard on March 25, 1975. On that date, after full consideration of the pleadings, memoranda and argument, the amended application for leave to appeal from the interlocutory order was denied by the fifth division of this court.

Turning now to the merits of the appeal before us, it is first necessary to consider the background of the pending federal

administrative proceedings. In October of 1972, the Congress of the United States passed the "Federal Water Pollution Control Act Amendments of 1972." (92 Congress, Public Act 92-500, 33 U. S. C. A. secs. 1251 *et seq.*, 86 Stat. 816.) This Act recites in section 1251 thereof the laudable objective of Congress "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." (33 U. S. C. A. sec. 1251(a).) This lengthy piece of legislation makes illegal the discharge of any pollutant by any person except in compliance with the Act. The Act requires limitations upon discharge of effluents no later than July 1, 1977, in accordance with the "application of the best practicable control technology currently available * * *." Not later than July 1, 1983, discharges are to be regulated and limited by "the best available technology economically achievable * * * which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants * * *." 33 U. S. C. A. sec. 1311(b)(1)(A) and (b)(2)(A).

As pointed out by defendant, this legislation contains water quality related effluent limitations, water quality standards and implementation plans, information and guidelines on water quality criteria and effluent limitations, provision for a water quality inventory to be presented to Congress, national standards of performance for control of the discharge of pollutants, toxic and pretreatment effluent standards to be published by the Administration (the Administrator of the Environmental Protection Agency), and provision for inspections and monitoring as regards industrial compliance. (See 33 U. S. C. A. secs. 1312 to 1318 inclusive.) The Act also contains sanctions of various types for enforcement.

The Act also establishes the National Pollutant Discharge Elimination System. (33 U. S. C. A. sec. 1342.) Commencing January 1, 1975, a permit from the Administrator is required for every industrial discharge into the waters of the United States. As authorized by Congress, the Administrator has established procedures for issuance of the permits and administration of the program thereunder. (See 40 C. F. R., part 125 and following.) Within 10 days after such permit has been issued, an adjudicatory hearing may be requested. Such hearing may be granted by the Administrator and will be held pursuant to public notice. Interested persons may request joinder as parties to the hearing so that they may have a voice as to the conditions and limitations of the permit.

The next stage is the holding of a prehearing conference before an administrative law judge for definition of the issues and then for rehearing. If provisions of the permit are disputed, a record is made and this, together with recommendations, is presented by the administrative judge to the regional administrator (sic). Ten days after regional decision has been rendered, an appeal may be had to the Administrator. Thereafter the aggrieved party may appeal to the United States Court of Appeals for the district in which he resides.

Defendant asserts in its brief, and it is agreed by the parties, that a permit has been issued to defendant by the Environmental Protection Agency as above described. This lengthy document imposes limitations upon operation of defendant's plant regarding discharge of industrial wastes into Lake Michigan and the Grand Calumet River. In 1977, these limitations will be made more stringent for the permittee. Discharge of 15 various substances, chemicals and minerals, are regulated by the conditions of this permit together with volume and temperature of water discharged.

Defendant further asserts, and it is undenied and apparently undisputed, that, after the issuance of the permit, defendant filed a timely request for an adjudicatory hearing. The Administrator granted this request and public notice of hearing has been issued. The State of Indiana and the city of Chicago have both joined in the adjudicatory proceedings as parties. It appears from an appendix to defendant's brief that the State of Illinois, acting through the Illinois Environmental Protection Agency, (established under the authority of Ill. Rev. Stat. 1973, ch. 111½, pars. 1001 and following), has filed a motion for intervention as a party to the adjudicatory hearing. It is also asserted in defendant's brief that a prehearing conference has been scheduled before an administrative law judge on April 16, 1975, to define the issues and set the matter for hearing. This is pursuant to statutory provisions as above summarized to determine the rights of the parties concerning the limitations expressed in the permit and the merits thereof.

Let us turn next to the legal background of the proceedings before us. Plaintiff's complaint is specifically predicated upon statutory authority. (Ill. Rev. Stat. 1973, ch. 42, pars. 326, 326aa and 326bb.) Paragraph 326aa provides generally that plaintiff has the "power and authority to prevent the pollution of any waters from which a water supply may be obtained by any city, town or village within the district." This action may be commenced in the circuit court of the county in which the district is located. Section 326bb contains pertinent definitions. It defines "pollution" as follows:

> The term 'Pollution' means such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.

This very statute was considered by the Supreme Court of Illinois in litigation between the same parties now before us. (*Metropolitan Sanitary Dist.* v. *U. S. Steel,* 41 Ill. 2d 440, 243 N. E. 2d 249.) On direct appeal from the circuit court, the Supreme Court affirmed a temporary injunction restraining defendant from polluting the waters of Lake Michigan by discharge of oil. The Court pointed out that plaintiff had statutory authority to prevent pollution of any waters from which a water supply may be obtained by any city, town or village within the District. Thus, the statutory power of plaintiff to seek injunctional relief by nuisance abatement against pollution of water supply has been confirmed with complete finality.

However, the creation of this statutory authority should not be viewed as a new or radical innovation in the law of Illinois. In fact, the right of an individual or a municipality to apply to a court of chancery for injunctional relief against pollution of a water supply and the rendition of such relief by the court has been recognized for many years. In *Ruth* v. *Aurora Sanitary District,* 17 Ill. 2d 11, 158 N. E. 2d 601, the Supreme Court affirmed an injunction ordering trustees of a municipality to abate a nuisance caused by discharge of sewage into a water supply source. This injunction had been obtained by a private individual and the Court referred to the action as "abatement of a public nuisance." (17 Ill. 2d 11, 17.) To illustrate the venerable age of this principle, we note that the Court cited *Green et al.* v. *Oakes,* 17 Ill. 249. There, in 1855, the Supreme Court reversed a decree dismissing a suit seeking to prevent obstruction of a public way. The Court referred to this as a nuisance and a wrong or invasion of the common right. Another instance of the recognition of the propriety of injunctional relief to restrain the pollution of a water supply is *City of Northlake* v. *City of Elmhurst,* 41 Ill. App. 2d 190, 190 N. E. 2d 375, citing *Barrington Hills Club* v. *Barrington,* 357 Ill. 11, 191

N. E. 239 and other authorities. The court pointed out that equity and law had concurrent jurisdiction in dealing with the abatement of a nuisance and that neither a natural person nor a municipal corporation has an inherent right to use a natural water course for disposal of sewage and waste water. 41 Ill. App. 2d 190, 197, 198.

As above shown, the point principally advanced by defendant is that the theory of primary jurisdiction requires that these proceedings be stayed. This theory is most ably expounded in Administrative Law Treatise by Professor Kenneth Davis (Vol. 3, sections 19.01 and following). From the pen of the text writer we learn that primary jurisdiction is a creature of the courts. In its application, the court will refrain from exercising its own jurisdiction "until after an administrative agency has determined some question or some aspect of some question arising in the proceeding before the court." Davis, Vol. 3, at page 3.

Perhaps the initial case in which the doctrine is brought forth is *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350. There, a shipper sued the railroad to recover allegedly excess charges on the theory that the rate charged by the carrier was unreasonable and discriminatory. Although jurisdiction in this type of case had traditionally been exercised by the courts, it was held that the matter should first proceed before the Interstate Commerce Commission. The Court pointed out that uniformity was essential in shipping rates so that the matter should not be left to determination by courts and juries. (See 204 U. S. 426, 439, 440.) The Court held, in effect, that action by the courts would be "wholly inconsistent with the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed." See 204 U. S. 426, 441.

In the opinion of the text writer, possibly the best judicial statement of primary jurisdiction is contained in *Far East Conf.* v. *United States,* 342 U. S. 570, 574, 96 L. Ed. 576, 72 S. Ct. 492. As shown in that case, the doctrine does not require complete withdrawal by the court. The essential is that the administrative agency should be permitted first or primarily to examine the situation so that in handling intricate facts the court may have the benefit of the specialized expertise which presumably will be brought to bear upon the situation by the administrative agency. The doctrine does not oust the court from jurisdiction but merely delays the exercise of power by the court. After having had the benefit of expert initial determination by the administrative agency, the court may proceed to final judgment.

Counsel before us have cited numerous decisions by the United States Supreme Court and other authorities. It is unnecessary to review all of these cases as there is no dispute between the parties regarding the existence of the doctrine or its definition. The problem lies in a determination of its applicability to the case before us. An additional factor requires consideration. It is undoubtedly correct, as counsel for plaintiff urge, that Congress has constantly recognized and attempted to preserve the inherent right of state and local governments to protect the water supply of their citizens from industrial and other pollution. Congress has declared and described its policy, "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution * * * ." (See 33 U. S. C. A. § 1251.) Congress has made appropriations to States and interstate agencies to help defray the cost of establishing and maintaining adequate measures for prevention and control of water pollution. 33 U. S. C. A. § 1256(a).

We find strong concern expressed by Congress for perpetuation and encouragement of the rights of states and municipalities

to prevent pollution of the water supply of their citizens in the federal legislation added in October 1972, upon which the pending adjudicatory hearing on the permit issued to defendant is based. We have already noted the recital in this current legislation of the policy of Congress "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution * * * ." (33 U. S. C. A. § 1251(b).) The use of the word "primary" is of special force and significance.

The new legislation also specifies that it shall not "restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation * * * ." (33 U. S. C. A. § 1365(e).) In addition, the current legislation contains a general reference which not only shows again the strong policy of Congress to preserve and perpetuate the rights of states and political subdivisions thereof to adopt and enforce their own standards for limitations regarding discharge of pollutants but specifically prevents such states or political subdivisions from adopting less stringent standards for limitations than those applied by the federal authorities. In the same enactment, Congress provided that new legislation should not "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U. S. C. A. § 1370.

In our opinion, these repeated congressional pronouncements show the continuing intention of Congress not only to perpetuate rights of municipalities, such as plaintiff, to adopt and enforce requirements to abate pollution more stringent than any which may be adopted under the federal system but also to make certain that this activity by states and municipal corporations, such as plaintiff, continues for the public benefit.

All of these strong and reiterated provisions regarding the continuing rights of states and municipalities to protect their water supplies must be construed and considered in connection with the specific Illinois enactment granting plaintiff "power and authority to prevent the pollution of any waters from which a water supply may be obtained by any city, town or village within the District." The same enactment authorizes plaintiff to commence action in the circuit court in the county in which plaintiff is located "for the purpose of having the pollution stopped and prevented either by mandamus or injunction." (Ill. Rev. Stat. 1973, ch. 42, par. 326aa.) This is in addition to the common law right vested in plaintiff or in any other municipal corporation to institute and prosecute all necessary court action to eliminate pollution of water supplies as a common law nuisance.

In addition to this extensive legislative background, we note the provision in the permit issued to plaintiff providing that nothing therein "shall be construed to preclude the institution of any legal action or relieve the permitee from any responsibilities, liabilities, or penalties established pursuant to any applicable State Law or regulation under authority preserved by section 510 of the Act." [33 U. S. C. A. § 1370 above cited.]

In this court, defendant urges strongly that the trial court and the federal administrative agency are actually hearing the same matter and that orderly and sensible coordination of their work would best be served by application of the doctrine of primary jurisdiction. According to the defendant's view, there are "intricate, complex and voluminous scientific, technological, and economic facts relevant to the present action [which] must be determined in the first instance by the specialized agency through its expertise." It is defendant's contention that "consistency and uniformity in the determination of factual questions" raised in both the administrative hearing and the present action are in-

dispensable and that these objectives can be accomplished only if this court will stand aside and permit completion of the fact-finding process by the administrative body; with the thought that, after this process has been concluded, this court will then be free to exercise its own jurisdiction concerning abatement of pollution of municipal drinking water. We cannot accept this argument. In our opinion, it is based entirely upon the faulty and erroneous premise that both this court and the federal administrative agency are dealing with the identical problem. From a completely general and superficial point of view, it may be stated with an apparent degree of validity that the ultimate objective of both jurisdictions is attainment of an unpolluted water supply. But, the method and manner of reaching this desired objective is entirely different in the two jurisdictions.

The adjudicatory hearings before the federal agency will be concerned with a permit which expressly approves and validates continued pollution of the water supply until its expiration date of July 31, 1979. The record does not show precisely what is expected to follow after the expiration date. However, it seems from the federal statute that another permit will then be issued in an attempt gradually to eliminate the pollution problem. In complete contrast, the proceedings before this court are not concerned with a gradual and permissive elimination of the problem. The gist of the abatement action is, exactly as its name implies, an attempt to terminate the pollution, subject only to such essential delays as may be absolutely necessary and unavoidable. In short, the federal administrative hearings are concerned with permissive regulation and the proceedings before us involves total abatement. The proceedings before us are thus completely divergent from the matter pending before the administrative body. In a situation of this type, the doctrine of primary jurisdiction is not applicable. We do not have here an issue of priority of jurisdiction but we have two tribunals which are approaching

a problem from entirely different points of view and which are attempting to exercise jurisdiction in two entirely different matters. This conclusion is strongly supported by a number of factors.

Were we to apply the doctrine of primary jurisdiction, this court would be required completely to overlook the strong and definite language used by Congress with the clear objective of encouraging the rights of municipalities in the field of water pollution abatement. We would be obliged to conclude that the language of Congress, which expressly permits municipalities to adopt more stringent standards, is meaningless. The only conclusion which we can reach from the express provisions enacted by Congress is that the legislation creating the administrative body may not be construed as affecting the jurisdiction of the states with respect to the waters in question. It seems manifest that the Congress intended by this and other language in the statute expressly to preserve for exercise by the states the type of jurisdiction here sought to be invoked by plaintiff. In addition, to reach agreement with defendant's point of view, we would also similarly be obliged completely to disregard the language of the administrative permit above set forth. We note *Barrington Hills Club* v. *Barrington,* 357 Ill. 11, 21, 22, 191 N. E. 239 where the court relied upon similar language in a Sanitary Water Board permit as a factor in permitting an action in equity to abate water pollution as a nuisance despite issuance of the permit.

We have considered the decision which first established the primary jurisdiction doctrine. (*Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350.) We are aware that the doctrine was fashioned and applied by the Court despite the specific statement by Congress in the Interstate Commerce Act that the legislation was not intended to abridge or alter previously existing common law remedies. The decision involved the need for uniformity of rates charged by

a common carrier. This is a totally different field depending upon facts and concepts completely immaterial in the case before us. While uniformity is essential concerning rates charged by a common carrier, no such factor exists in abatement of water pollution. Virtually the identical argument was raised by this defendant and expressly rejected by the Supreme Court of Illinois with reference to a case involving pollution of the waters of Lake Michigan by discharge of oil. See *Metropolitan Sanitary Dist.* v. *U. S. Steel,* 41 Ill. 2d 440, 443, 243 N. E. 2d 249.

Prior to adoption of the 1972 Water Pollution Control Amendments, the Supreme Court held that the federal legislation as it then existed did not in any manner curtail the right to abatement of water pollution as a public nuisance (*Illinois* v. *City of Milwaukee,* 406 U. S. 91, 104, 31 L. Ed. 2d 712, 92 S. Ct. 1385):

> The application of federal common law to abate a public nuisance in interstate or navigable waters is not inconsistent with the Water Pollution Control Act. Congress provided in § 10(b) of that Act that, save as a court may decree otherwise in an enforcement action, '[s]tate and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not . . . be displaced by Federal enforcement action.'

After the adoption of these amendments, two decisions by District Courts reached the same conclusion regarding the absence of legal effect of the amendments upon preexisting rights to abate water pollution as a nuisance. In *United States ex rel. Scott* v. *United States Steel Corp.* (N. D. Ill. 1973), 356 F. Supp. 556, the Court affirmed the right of the United States and the State of Illinois to proceed by common law action to abate water pollution as a nuisance. The Court did not find in the 1972 amendments any provision "which purports to abolish

the Federal common law of nuisance but rather an intention to supplement and amplify any preexisting remedies."

The same conclusion was reached in *People of St. of Ill. ex rel. Scott* v. *City of Milwaukee, Wis.* (N. D. Ill. 1973), 366 F. Supp. 298. The court stated:

> An analysis of the 1972 amendments of the Federal Water Pollution Control Act clearly shows that Congress in no way intended to destroy any remedies available to the states prior to the passage of the 1972 amendments. Thus, in § 101(b), the Congress adopts a statement very similar to that which previously existed in 33 U. S. C. § 1151(b):
>
> > 'It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce and eliminate pollution.'

It is correct that these cases did not directly involve the doctrine of primary jurisdiction. They are, however, specific precedents regarding the legal effect of the 1972 Water Pollution Control Amendments. These decisions should not be disregarded in determination of whether this court should invoke a theory created by the courts themselves.

Defendant's counsel urge strongly that there are operative reasons which require application of primary jursidiction to the situation before us. Defendant first cites, as the guiding principle for this determination, the following language from *United States* v. *Western Pac. R. Co.*, 352 U. S. 59, 64, 1 L. Ed. 2d 126, 77 S. Ct. 161:

> No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.

Defendant analyzes the case by advancing three reasons indicating the necessity for administrative action. First, defendant contends that application of primary jurisdiction will result in "orderly and sensible coordination" between the roles of court and agency. Defendant amplifies this statement by expressing the thought that the Environmental Protection Agency has powers and skills to ascertain proper water quality standards, to evolve compliance schedules for achieving abatement and to provide a forum where all rights and interests of all parties will be protected. The record before us does not show any evidence of these facts. Even assuming that they exist, they do not, in our opinion, constitute a sufficient reason for withholding the jurisdiction of this court which has already properly been invoked by plaintiff. The record before us demonstrates no reason why the trial court cannot obtain expert testimony and then act with reasonable promptness to secure complete abatement as distinguished from palliative gradualism.

Defendant's second contention is the presence of "intricate, complex and voluminous scientific, technological and economic facts relevant to the present action" which must be determined by the specialized administrative agency. We cannot agree with this statement. On oral argument, counsel for plaintiff informed us that there is presently cooperation between representatives of defendant, of plaintiff and of the administrative agency in checking and monitoring the level of polluting discharges from defendant's plant. The questions posed by defendant can be solved by the trial court in the case before us with the help of the same experts who would of necessity be called to testify before the United States Environmental Protection Agency. Examples of these questions put by defendant are the ecological effect of discharges from defendant's plant into Lake Michigan and other waters; effects of these discharges upon public use and enjoyment of the waters; the level of discharge of pollutants by

defendant's plant "which would have no deleterious effect" upon the use and enjoyment of the water supply; what abatement facilities are necessary and by what date should construction of these facilities be completed. If it is true, as defendant suggests, that any tribunal which hears this matter will be confronted with complicated facts requiring expert assistance, we know of no reason why testimony of these same experts cannot be successfully applied by the trial court. As defendant points out in its reply brief, in *United States* v. *Rohm & Haas Company* (5th Cir. 1974), 500 F. 2d 167, the Court explained that one essential reason why primary jurisdiction was not invoked was that experts from the federal agency "were consulted and testified in detail and at length" before the Court. 500 F. 2d 167, 175.

The third reason advanced by defendant is the need for "consistency and uniformity" between the adjudicatory hearing under the National Pollutant Discharge Elimination System and the trial court. As we have shown, the adjudicatory hearing and the abatement proceedings approach the problem from different points of view. The 1972 Amendments expressly declare and preserve the rights of local government to evolve and enforce more stringent requirements than those of the administrative body as contained in the permit issued to defendant. Thus, we cannot accept defendant's argument that "a difference in orientation [between the two tribunals] would in all likelihood result in irreconcilable determinations of fact and incompatible abatement programs."

The trial judge heard all of these arguments presumably advanced by defendant's able counsel with the same force and skill that they have demonstrated in this court. The trial court remained undaunted by the grim prospect of the possibility of irreconcilable differences or the pressing need for primary ad-

ministrative determination. In our opinion, all necessary factual questions presented by this record can be determined by the trial court with at least the same, and perhaps greater, skill and expertise than any administrative body would manifest.

Defendant cites many additional cases which it depends upon to illustrate application of the doctrine of primary jurisdiction by the courts of Illinois:

City of Chicago v. *General Motors Corporation* (N. D. Ill. 1971), 332 F. Supp. 285, involves a class action by the city of Chicago in an attempt to prevent manufacturers of motor vehicles from polluting the air of the city. The District Court first held that the suit could not be continued by plaintiff as a class action. The Court also held that federal law had preempted the right of states and political subdivisions thereof to enforce any standard relating to the control of emissions from new motor vehicles. (42 U. S. C., § 1857f-6a(a) cited at 332 F. Supp. 285, 290.) Regarding older automobiles not included within this statute, the Court was of the opinion that plaintiff should and could proceed under the Environmental Control Act of Illinois before the Pollution Control Board. (Ill. Rev. Stat. 1973, ch. 111½, pars. 1001 *et seq.*) The question of air pollution by millions of automobiles entering the city of Chicago from other states and countries may hardly be compared to the situation involving water pollution by the defendant's facilities. Automobile emission standards necessarily require a uniformity of federal regulation.

Dunlap Lake Prop. Owners Ass'n. v. *Edwardsville,* 22 Ill. App. 2d 95, 159 N. E. 2d 4, is entirely inapposite on its facts. There, this court (Fourth District) reversed an injunction against continued use by the city of Edwardsville of a sanitary sewer which allegedly caused sewage to flow into plaintiff's private lake. The court held that "there was no actual evidence of pollu-

tion." (22 Ill. App. 2d 95, 98.) The court also pointed out that there was no dispute as to the public policy of the State "in the control, abatement and prevention of the pollution of public waters." (22 Ill. App. 2d 95, 97.) The court expressed its attitude that control and abatement of water pollution is "best left to the specializied agency therewith concerned except in cases of flagrant and obvious pollution." (22 Ill. App. 2d 95, 99.) The court proceeded upon the basis heretofore expressed that the matter of the existence of pollution was left open for determination but also took the position that cases of flagrant and obvious pollution should necessarily be the subject of abatement by the courts. In the case before us, the fact of pollution of drinking water by discharges from defendant's plant is a matter of common knowledge. This fact is conceded by the defendant as demonstrated by the permit under which it claims to be authorized to continue to pollute the water supply. Thus the case at bar comes within the *Dunlap Lake* classification of "flagrant and obvious pollution." Need for expertise which may arise in the record before us will come not from any issue regarding existence of pollution but only from defendant's attempts to postpone complete cessation of the water pollution which its activities cause.

Dunlap Lake is to be contrasted with *Metropolitan Sanitary Dist.* v. *U. S. Steel,* 41 Ill. 2d 440, 243 N. E. 2d 249, where uncontroverted expert testimony established the fact of pollution of the drinking water and the Supreme Court of Illinois expressly upheld the power of the Court in proceedings to enjoin water pollution.

Bank of Lyons v. *County of Cook,* 13 Ill. 2d 493, 150 N. E. 2d 97, involves exhaustion of remedies. We will later set out the complete difference between primary jurisdiction and exhaustion of remedies. The latter principle has no application in the case before us. *Salk* v. *Department of Registration & Education,*

123 Ill. App. 2d 320, 260 N. E. 2d 123; *City of Wheaton* v. *Chicago, A. & E. Ry. Co.*, 3 Ill. App. 2d 29, 120 N. E. 2d 370 and *Colton* v. *Commonwealth Edison Co.*, 349 Ill. App. 490, 111 N. E. 2d 363, all involve exhaustion of remedies.

After consideration of all of the many authorities cited by both sides, including those which lack of space prevents us from commenting upon, we have concluded that the closest case to the one before us is *State ex rel. Shevin* v. *Tampa Electric Company*, 291 So. 2d 45, (Fla. App.), cert. denied by Supreme Court of Florida, 297 So. 2d 571, (Fla.). There, the trial court dismissed a suit for injunction to restrain pollution of the air by defendant's plant. The court acted upon the doctrine of primary jurisdiction. The appellate court examined and explained the doctrine and held that it was erroneously applied by the trial court. The court pointed out that, "The determination of a public nuisance as prayed for here, for example, is historically a judicial function, but is not necessarily dependent upon technically established criteria for its resolution." (291 So. 2d 45, 47.) Defendant takes the position that the Florida Appellate Court proceeded upon the absence of technical questions of fact. The court did indeed state that the issue in a nuisance abatement case was primarily a matter of law in determining whether the conditions complained of constitute a nuisance. The court also pointed out, however, that the ultimate question for judicial decision was whether these conditions "constitute a nuisance as a matter of law." (291 So. 2d 45, 48.) The court did not state that there were no questions of fact but specifically noted that if there were "practicalities" involved which required consideration from a technological point of view, that regardless of the potentially technical nature of these matters "they more properly ought to be taken into account by the trial court in the mandate of any injunctive relief deemed warranted." At this point the court further stated (291 So. 2d 45, 48):

> Certainly, the primary jurisdiction doctrine notwithstanding, highly technical matters per se are no strangers to the courts. In any case, the existence of such 'practicalities,' of itself, is surely not a ground for either dismissal of the action or for the invocation of the 'primary jurisdiction doctrine as we understand it to be.

We therefore, come to the considered conclusion that the trial court was completely correct in denying the motion of defendant to stay or alternatively to dismiss the proceedings on the ground of primary jurisdiction.

The second legal theory stated by defendant in support of its desire to stay these proceedings is that of exhaustion of remedies. This contention may be readily shown to be inapplicable here. As pointed out by Professor Davis, primary jurisdiction "is altogether different from the doctrines of exhaustion and of ripeness which govern the timing of judicial review of administrative action. The doctrine of primary jurisdiction determines whether the court or the agency should make the initial decision." (Davis, Vol. 3, section 19.01 at page 2.) The Illinois Supreme Court has defined exhaustion of remedies as applicable to a situation where "a party aggrieved by administrative action ordinarily cannot seek review in the courts without first pursuing all administrative remedies available to him." (*Ill. Bell Telephone Co.* v. *Allphin*, 60 Ill. 2d 350, 358, 326 N. E. 2d 737.) As stated in *United States* v. *Western Pac. R. Co.*, the doctrine of exhaustion "applies where a claim is cognizable in the first instance by the administrative agency alone; judicial interference is withheld until the administrative process has run its course." (352 U. S. 59, 63.) Under any of these slightly variant definitions, the doctrine patently has no application here.

This conclusion is fortified by examination of *Bank of Lyons* v. *County of Cook*, 13 Ill. 2d 493, 150 N. E. 2d 97 most strongly relied upon by defendant in this regard. There, the Supreme Court of Illinois dismissed an action which sought to

invalidate a zoning ordinance in its application to plaintiff's property on the theory that plaintiff had failed to exhaust administrative remedies. It was agreed that plaintiff had failed completely to seek relief before the Cook County Board of Zoning Appeals. The Supreme Court held that the administrative remedy was readily available and that it should have been resorted to in the interest of an orderly procedure. The holding in *Bank of Lyons* is readily reconciled with the above legal definitions by Professor Davis and the courts. The zoning claim in *Bank of Lyons,* was "cognizable in the first instance by an administrative agency alone." There, the trial court had jurisdiction only after the administrative body had first passed upon the claim. On the contrary, in the case before us, the issues regarding abatement of a nuisance are not cognizable by the administrative body.

One final matter requires additional discussion. Defendant's original and reply briefs are replete with assertions that the trial of this case will present many technical and complicated facts which must be the subject of proof before the trial court. The very basis of defendant's argument is that these facts are best presented to an administrative agency for determination prior to trial by the court. This seemingly valid argument requires analysis from another point of view.

Plaintiff's complaint presents a rather simple subject; namely, that the operation of defendant's plant has severely fouled and polluted the water of Lake Michigan. This basic fact is virtually conceded by defendant which has obtained and relies upon a permit from the United States Environmental Protection Agency. This document is, in effect, an admission of present water pollution by defendant's plant and a license to continue this pollution in varying degrees for a number of years. It follows necessarily that the central issue which the trial court will be obliged to decide in the case presented by plaintiff is a pure issue of law as to whether the amount and type of water pollution expressly authorized by the permit constitutes an abatable

nuisance under the law of Illinois. The necessity for complicated fact-finding by the trial court will arise principally from matter which defendant may wish to offer in its defense.

Defendant filed a verified motion in which it stated a pure conclusion that the administrative agency in its adjudicatory hearing "is required to make the same factual determinations, involving complex and intricate scientific, technological, and economic questions, as are presented to this court in the present matter." According to the record before us, defendant did not present any evidence to the trial court. There is no proof that these "complex and intricate" questions indeed exist; or, that the trial court would necessarily be confronted with matters of this type. Certainly bare assertions by counsel upon a matter they classify as so complicated, such as the expenditure required to prevent further water pollution from defendant's activities, cannot replace evidence. Thus, defendant's posture in this appeal is that of a party who has presented a conclusory allegation in its pleading without any evidence or even an offer of proof to support its contention. See *Burke* v. *Burke*, 12 Ill. 2d 483, 487, 147 N. E. 2d 373.

The order appealed from contains a recital that the court heard oral argument and was "advised in the premises." In view of this recital in the order, in the absence of contrary indication reflecting presentation of testimony to the court, we must assume "that the decision rendered by the court was the right decision and was justified by the facts before it." (*Smith* v. *Smith*, 36 Ill. App. 2d 55, 59, 183 N. E. 2d 559 cited in *Dorbin* v. *Yellow Cab Co.*, 14 Ill. App. 3d 586, 588, 302 N. E. 2d 633 which also cites *Skaggs* v. *Junis*, 28 Ill. 2d 199, 201, 202, 190 N. E. 2d 731.) Thus, in addition to the considerations above set forth, this court is clearly mandated by the law of Illinois to affirm the order appealed from.

Order Affirmed.

EGAN and SIMON, *JJ.*, concur.

APPENDIX B.

ORDER OF THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, DENYING PETITION FOR REHEARING.

THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, a municipal corporation,
Appellee,

No. 61503 *vs.*

UNITED STATES STEEL CORPORATION, et al.,
Defendants Below,

ON APPEAL OF UNITED STATES STEEL CORPORATION,
Appellant.

Appeal from the Circuit Court of Cook County.

The petition of Appellant for rehearing is denied.

Enter: July 14, 1975

APPENDIX C.

ORDER OF THE SUPREME COURT OF ILLINOIS DENYING PETITION FOR LEAVE TO APPEAL.

UNITED STATES OF AMERICA.

STATE OF ILLINOIS
SUPREME COURT } ss.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of September in the year of our Lord, one thousand nine hundred and seventy-five, within and for the State of Illinois.

Present: ROBERT C. UNDERWOOD, *Chief Justice*
JUSTICE WALTER V. SCHAEFER
JUSTICE DANIEL P. WARD
JUSTICE JOSEPH H. GOLDENHERSH
JUSTICE THOMAS E. KLUCZYNSKI
JUSTICE CHARLES H. DAVIS
JUSTICE HOWARD C. RYAN
WILLIAM J. SCOTT, *Attorney General*
WILLIAM G. LYONS, *Marshal*
Attest: CLELL L. WOODS, *Clerk*

Be It Remembered, that, to-wit: on the 25th day of September 1975, the same being one of the days of the term of Court

aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, a municipal corporation, *Respondent,* vs. UNITED STATES STEEL CORPORATION, *Petitioner.*	Petition for Leave to Appeal from Appellate Court, First District. 61503 70 CH 964

No. 47791

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by it in this behalf expended, to be taxed, and that it have execution therefor.

I, Clell L. Woods, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 17th day of October, 1975.

/s/ CLELL L. WOODS,
Clerk, Supreme Court of the State of Illinois.

APPENDIX D.

PERTINENT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS.

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PERTINENT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS.

I. Constitution of the United States, XIV Amendment, Section 1:

". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

II. Pertinent Provisions of the Federal Water Pollution Control Act Amendments of 1972, Title 33 U. S. C., § 1251 et seq.:

Title 33 U. S. C., § 1311. Effluent limitations—Illegality of pollutant discharges except in compliance with law

(a) Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

Timetable for achievement of objectives

(b) In order to carry out the objective of this chapter there shall be achieved—

(1) (A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

* * * * *

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2) (A) not later than July 1, 1983, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable with regulations issued by the Administrator pursuant to section 1314 (b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirements under section 1317 of this title; and * * *

* * * * *

Title 33 U. S. C., § 1341. Certification—Compliance with applicable requirements; application; procedures; license suspension

(a)(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or

has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

* * * * *

Compliance with other provisions of law setting applicable water quality requirements

(b) Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

Title 33 U. S. C., § 1342. National pollutant discharge elimination system—Permits for discharge of pollutants.

(a) (1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

* * * * *

State permit programs.

(b) At any time after the promulgation of the guidelines required by subsection (h)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

* * * * *

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

* * * * *

Compliance with Permits.

(k) Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 and 505, with sections 301, 302, 306, 307, and 403, except any standard imposed under section 307 for a toxic pollutant injurious to human health. * * *

Title 33 U. S. C., § 1370. State authority.

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

* * * * *

III. Pertinent Provisions of the National Pollutant Discharge Elimination System (NPDES) Regulations, Title 40 C. F. R., Part 125:

Subpart B—Processing of Permits

Title 40 C. F. R., § 125.11 General provisions.

(a) All discharges of pollutants or combination of pollutants from all point sources into the navigable waters, the waters of the contiguous zone, or the ocean are unlawful and subject to the penalties provided by the Act, unless the discharger has a permit or is specifically relieved by law or regulation from the obligation of obtaining a permit. A discharge authorized by a

permit must be consistent with the terms and conditions of such permit. Discharges in violation of permit terms and conditions may result in the institution of proceedings under the Act.

* * * * *

Subpart C—Terms and Conditions of Permits

Title 40 C. F. R., § 125.21 Prohibitions.

* * * * *

(b) No permit shall be issued where pursuant to section 401(a)(2) of the Act, the imposition of conditions cannot insure compliance with the applicable water quality requirements of all affected States.

* * * * *

Title 40 C. F. R., § 125.23 Schedules of compliance in permits.

Regional Administrators shall follow the procedures below in setting schedules of compliance in permits:

(a) With respect to any discharge which is not in compliance with applicable effluent standards and limitations, applicable water quality standards, and other applicable requirements, the permittee shall be required to take specific steps to achieve compliance with the following:

(1) Any schedule of compliance contained in:

(i) Applicable effluent standards and limitations; or,

(ii) Water quality standards, if more stringent; or,

(iii) Any other legally applicable requirements, if more stringent.

(2) In the absence of any applicable schedule of compliance, in the shortest reasonable period of time, such period to be consistent with the guidelines and requirements of the Act.

* * * * *

Title 40 C. F. R., § 125.36 Adjudicatory hearings.

* * * * *

(b) *Requests for adjudicatory hearings and legal decisions.* (1) Within 10 days following the date of determination with regard to a permit pursuant to § 125.35(a) of this subpart or any modification thereto, any interested person may submit to the Regional Administrator a request for an adjudicatory hearing pursuant to paragraph (b)(2) of this section or a legal decision pursuant to paragraph (m) of this section, to reconsider the determination with regard to a permit and the conditions contained therein.

* * * * *

(d) *Additional parties and issues.* (1) Any person may submit a request to be admitted as a party within thirty (30) days after the date of publication of public notice of an adjudicatory hearing specified in § 125.32 of this subpart. The Regional Administrator shall grant any request which meets the requirements of paragraph (b)(2) of this section. The request must set forth all material issues of fact the requestor seeks to be considered at the adjudicatory hearing.

(2) Following the expiration of the time provided in paragraph (d)(1) of this section for the submission of requests to be admitted as a party, any person may file a motion for leave to intervene as a party in an adjudicatory hearing. * * *

* * * * *

(l) *Initial decision by Regional Administrator.* (1) Within 10 days after completion of testimony and cross-examination of witnesses or within 5 days from the receipt of proposed findings and conclusions, whichever is later (or later if the parties agree), the Presiding Officer shall certify the record, together with any proposed findings and conclusions submitted by the

parties, to the Regional Administrator for an initial decision. Within twenty (20) days following certification of the record the Regional Administrator or his designee shall issue an initial decision and promptly notify the parties and the Administrator thereof.

* * * * *

(4) The initial decision of the Regional Administrator shall become the final decision of the Agency unless within ten (10) days after its issuance any party shall have appealed the initial decision to the Administrator pursuant to paragraph (n)(1) of this section, or unless the Administrator on his own motion pursuant to paragraph (n)(2) of this section shall have stayed the effectiveness of the decision of the Regional Administrator pending review.

* * * * *

(n) *Appeal of initial decision of the Regional Administrator.* (1) Any party may file a petition for the Administrator's review of the initial decision of the Regional Administrator or the decision of the Assistant Administrator for Enforcement and General Counsel relied upon by the Regional Administrator in rendering the initial decision.

(2) The Administrator may, on his own initiative, review the initial decision of the Regional Administrator. Notice of each decision shall be mailed to all parties, by certified mail, within two days after the Administrator has determined, pursuant to this subparagraph, to review the initial decision of the Regional Administrator.

(3) Any person seeking review of the initial decision of the Regional Administrator by the Administrator shall, within ten (10) days of the initial decision of the Regional Administrator file with the Administrator and mail, by certified mail, to all parties a petition for the Administrator's review. * * *

(4) The Administrator shall promptly determine whether the petition for review is accepted or denied. The Administrator, in his descretion, may decline to review the initial decision of the Regional Administrator in which case the initial decision becomes the final decision of the Administrator. If the Administrator accepts the petition for review, he shall notify the parties of the matters to be considered on review and set forth the time in which briefs may be filed.

Title 40 C. F. R., Subpart E. Miscellaneous

§ 125.41 Objections to permit by another State.

(a) Whenever following receipt of the certification described in § 125.15 the Regional Administrator determines that a discharge may affect the quality of the waters of any State other than the State that made the certification, the Regional Administrator shall, within 30 days of such certification, notify such other State and the applicant of his determination and shall transmit to such other State a copy of the fact sheet described in § 125.33 and upon request, a copy of the application and a copy of the draft permit prepared pursuant to § 125.31. If such other State determines, within 60 days from the date notice was received from the Regional Administrator, that the discharge will affect the quality of its waters so as to violate any water quality requirement in such State, such other State shall within such 60-day period notify the Regional Administrator in writing of its objection to the issuance of a permit and request a public hearing on the objection. Upon receipt of such request, the Regional Administrator shall hold a hearing in conformity with § 125.34 herein. Based upon the record, a permit shall issue, provided that if the imposition of conditions can not assure compliance with the applicable water quality requirements of all of the affected States, the permit shall be denied.

(b) Each affected State shall be afforded an opportunity to submit written recommendations to the Regional Administrator

which the Regional Administrator may incorporate into the permits if issued. Should the Regional Administrator fail to incorporate any written recommendations thus received, he shall provide to the affected State or States a written explanation of his reasons for failing to accept any of the written recommendations.

(c) Where an interstate agency has authority over waters that may be affected by the issuance of a permit, it shall be afforded the rights of a State pursuant to paragraph (a) and (b) of this section.

FILED
FEB 20 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-876

UNITED STATES STEEL CORPORATION,
Petitioner,

vs.

THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, A MUNICIPAL CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO DEFENDANT'S PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

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THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, A MUNICIPAL CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO DEFENDANT'S PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

PREFATORY STATEMENT.

Since 1967, the Metropolitan Sanitary District of Greater Chicago has pursued a carefully planned enforcement program in the Illinois courts to abate the industrial pollution of Lake Michigan. These actions have been prosecuted against the major industrial polluters of Lake Michigan, and have been based on theories of common law nuisance, and the Sanitary District's special statutory authority (Illinois Rev. Stat., Chapter 42, §§ 326, 326a and 326bb).

These lawsuits have, for the most part, resulted in the entry of significant consent decrees, whereby the pollution defendants

have agreed to install advanced pollution control equipment. These decrees include: *People of the State of Illinois and Metropolitan Sanitary Dist.* v. *United States Steel Corp.*, 69CH3334, 67CH5772 (U. S. Steel South Works, Chicago; $30 million recycling system installed); *Metropolitan Sanitary District and People of the State of Illinois* v. *Interlake, Inc.*, 69CH3533, 70CH937 ($10 million recycling system installed); *People of the State of Illinois and Metropolitan Sanitary District* v. *Republic Steel Corp.*, 69CH3675, 69CH3532 ($12 million recycling system to be completed by 1978). The Sanitary District has also filed suit against numerous Indiana industries whose discharges were polluting the Illinois waters of Lake Michigan. *Metropolitan Sanitary District* v. *Inland Steel Co., Youngstown Sheet & Tube Co., American Steel Foundry, Cities Service Oil Co., Socony-Mobil Oil Co., Lake Cities Corp., Clark Oil & Refinery, U. S. Gypsum Co., The Texas Company, Sinclair Refining Co., American Oil Co. and Union Carbide & Carbon Corp.*, 67 CH 5682. The cases against Youngstown Sheet & Tube Co. and Inland Steel Co. were later consolidated with actions brought by the Attorney General of Illinois, and resulted in consent decrees against each, Youngstown being required to spend over $30 million for recycling and Inland Steel agreeing (after months of trial) to build a $90 million waste-water recycling system at its giant steel mill in East Chicago, Indiana.

The Sanitary District's case against U. S. Steel Corp., Gary Works (defendant herein), stands as the major remaining hurdle to its attempt to insure the purity of Lake Michigan water for the citizens of the Chicago area.

Defendant's motion to stay or dismiss the Sanitary District's case pending a determination by the U. S. Environmental Protection Agency is understandable, but was unwarranted, and would, if granted, serve only to delay the trial and subsequent abatement of defendant's pollution-causing activities, to the obvious detriment of the health and welfare of the citizens of Greater Chicago. The doctrine of primary jurisdiction, upon

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which the defendant relies, simply has no application to this case, and this Court should deny defendant's petition for certiorari so that the trial of this important matter may proceed with dispatch.

I.

THE UNDERLYING REASONS AND REQUIREMENTS FOR THE DOCTRINE OF PRIMARY JURISDICTION ARE NOT PRESENT IN THIS CASE.

The doctrine of primary jurisdiction is normally applied only in situations where a court and an administrative agency have *concurrent jurisdiction* and power to determine the same legal problem under the same legislative policy. *E.g., Far East Conf.* v. *United States,* 342 U. S. 570, 575 (1952); Schwartz, *Primary Administrative Jurisdiction and the Exhaustion of Litigants,* 41 Geo. L. J. 495, 499 (1953); Note, 66 Harv. L. R. 151 (1952). In such cases, the courts defer resolution of complicated factual questions to the agency's determination in order to provide *uniformity of construction* of the regulations in question, *e.g., Texas & Pacific Ry.* v. *Abilene Cotton Oil Company,* 204 U. S. 426, 440 (1907), and to utilize the *expertise* of the administrative agency, *e.g., Great Northern Ry.* v. *Merchants Elevator Co.,* 259 U. S. 285, 291 (1922).

However, the doctrine of primary jurisdiction should not be used to deprive courts of their traditional and constitutional judicial functions. *E.g., State ex rel. Shevin* v. *Tampa Electric Co.,* 291 So. 2d 45 (Fla. App. 1974); *Pottrock* v. *Continental Can Co.,* 210 A. 2d 295 (Del. 1965); *Stanton* v. *Trustees of St. Joseph's College,* 233 A. 2d 718 (Me. 1967). Therefore, where the purposes or reasons for the doctrine are not present in a specific case, the doctrine will not be applied. *United States* v. *Radio Corp. of America,* 358 U. S. 334, 350 (1959); *United States* v. *Western Pacific Ry.,* 352 U. S. 59, 63-4 (1956).

None of the purposes or requirements for the doctrine are present. *Uniformity* is not an issue because Congress has recognized the power of the states and local governments to set diverse and stricter standards for pollution control. Likewise, *uniformity* in the interpretation of federal regulations is not an issue, since the instant case is a common law nuisance action upon which the Environmental Protection Agency regulations have no bearing. Thus, there is no *concurrency* of jurisdiction by the Court and the Environmental Protection Agency over the specific question raised in this case—whether a defendant's activities constitute an abatable public nuisance. And very clearly, the outcome of the administrative proceedings will have no conclusive legal effect on the decision or the merits in the instant case. Finally, the resolution of complicated or technical questions in nuisance cases is, historically and actually, well within the competency of a court of equity, without the need to resort to alleged administrative *expertise*.

Since the reasons and requirements for the doctrine are not present, the doctrine of primary jurisdiction cannot be applied.

A. Uniformity in Interpreting Federal Regulations Is Not in Issue Since Congress and the Courts Have Recognized the Validity and Efficacy of Diverse and Stricter State and Local Standards and Remedies for Pollution Control.

Where uniformity of remedy is shown to have been clearly intended by Congress, or where such uniformity is necessary to effectuate the purpose of federal legislation, the courts should defer to the administrative agency. *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 437 (1907). Where, however, the administrative structure and the agency created by Congress are not intended to provide a pervasive and uniform remedy, the doctrine of primary jurisdiction does not apply, and courts are free to pursue traditional judicial remedies. *United States* v. *R. C. A.*, 358 U. S. 334, 350 (1959). As this Court said in *California* v. *Federal Power Commission*, 369 U. S. 482, 490 (1962):

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> . . . Our function is to see that the policy entrusted to the courts is not frustrated by an administrative agency. Where the primary jurisdiction is in the agency, courts withhold action until the agency has acted. *Texas & Pac. R. Co.* v. *Abilene Oil Co.*, 204 U. S. 426. The converse should also be true, lest the antitrust policy whose enforcement Congress in this situation has entrusted to the courts is in practical effect taken over by the Federal Power Commission. . . .

The statute and administrative mechanism invoked by United States Steel in the instant litigation is the Federal Water Pollution Control Act, 33 U. S. C. §§ 1151, 1251 *et seq.*, and the administrative regulations promulgated thereunder by the United States Environmental Protection Agency. In this Act, Congress has clearly and unmistakably demonstrated its intention to allow —and, more importantly, *to encourage*—states and local governments to formulate additional, stricter standards for control of water pollution. In addition, the Act makes manifest the Congressional intent that the states will remain completely free to develop and enforce their own multi-faceted common law and statutory procedures and remedies for combating such pollution.

Thus, section 1251(b) of the Federal Water Pollution Control Act recites the Congressional policy "to recognize, preserve, and protect the *primary* responsibilities of States to prevent, reduce, and eliminate pollution" (33 U. S. C. A. § 1251(b)) (Emph. added).

Similarly, section 1370 makes clear the intention to reserve state and local power to set and enforce stricter standards.

> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (a) any standard of limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard,

> prohibition, pre-treatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pre-treatment standard, or standard of performance which is less stringent then the effluent limitation, or other limitation, effluent standard, prohibition, pre-treatment standard, or standard of performance under this chapter . . . (33 U. S. C. A. § 1370).

Furthermore, in section 1365(e), Congress has declared:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or *common law* to seek enforcement of any effluent standard or limitation or to seek any other relief . . . (33 U. S. C. A. § 1365(e)) (Emphasis added).

The U. S. Environmental Protection Agency itself has recognized that its authority is not pre-emptive, and it has taken action to reinforce the reserved powers of the states. Thus, the very permit issued by that Agency to defendant gives warning that:

> 8. State Laws.
>
> Nothing in this Permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State Law or regulation under authority preserved by § 510 of the Act (Permit No. 000281, p. 52 of 58, para. 8, C. 560).

The federal and state courts have also recognized that the federal legislative enactments have not pre-empted state and local control of water pollution as it affects local interests. *E.g., Ohio* v. *Wyandotte Chem. Co.*, 401 U. S. 493 (1971); *Illinois* v. *City of Milwaukee*, 406 U. S. 91 (1972); *Askew* v. *American Waterways*, 93 S. Ct. 1590 (1973); *Procter & Gamble* v. *City of Chicago*, 509 F. 2d 69 (7th Cir. 1975); *People ex rel. Scott* v. *City of Milwaukee*, 366 F. Supp. 298 (N. D. Ill. 1973); *U. S.* v. *U. S. Steel Corporation*, 356 F.

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Supp. 556 (N. D. Ill. 1973); *U. S.* v. *Ira S. Bushey & Sons*, 363 F. Supp. 110 (D. Vt. 1973); *Metropolitan Sanitary District* v. *U. S. Steel Corporation*, 41 Ill. 2d 440 (1969).

Thus, this Court has held that a state common law nuisance action can be maintained in a state court against an out-of-state polluter despite the existence of federal administrative remedies. *Ohio* v. *Wyandotte Chemical Corp.*, 401 U. S. 493 (1971) (see especially the opinion of Justice Douglas, 401 U. S. at 509-10). And in *Illinois* v. *City of Milwaukee*, 406 U. S. 91, 104 (1972), this Court held that the pre-1972 Water Pollution Control Act did not in any manner curtail the right of the states to use the common law nuisance remedy to abate interstate water pollution. Said the Court:

> The adoption of federal common law to abate a public nuisance in interstate or navigible waters is not inconsistent with the Water Pollution Control Act. Congress provided in § 10(b) of that Act that, save as a court may decree otherwise in an enforcement action, "[s]tate and interstate action to abate pollution of interstate or navigible waters shall be encouraged and shall not . . . be displaced by Federal enforcement action."

Judge Bauer of the United States District Court[1] synthesized the holdings of these and other decisions best when he said:

> ". . . [T]he Supreme Court and other courts repeatedly rejected the contention that the Federal Water Pollution Control Act preempted the right of states to seek *common law nuisance relief from water pollution in state or federal courts.* This consistent *rejection* was made in response to the specific argument that the Federal Water Pollution Control Act was a congressional attempt to create a *comprehensive* and *uniform* federal control program." (*People ex rel. Scott* v. *City of Milwaukee*, 366 F. Supp. 298, 299 (N. D. Ill. 1973) (Emph. added).

The federal regulations and the above cited cases make clear that there is, in fact, no one *uniform* system for combat-

1. Since elevated to the Circuit Court of Appeals, 7th Circuit.

ing water pollution. There is instead Congressional encouragement and recognition that states and local governments may use diverse remedies, and may seek to impose *stricter* standards on polluters and environmental despoilers. It cannot be seriously argued, therefore, that administrative determination is needed to insure uniformity in interpretation of pollution control measures.

B. Uniformity in Interpreting Federal Regulations Is Not in Issue Since the Instant Case Is a Traditional Common Law Nuisance Action, Upon Which the Federal Regulations Have No Bearing.

The doctrine of primary jurisdiction originated and is generally applied in cases where the court and agency are concurrently construing the same law, usually the statute which created the agency. *E.g., Texas & Pacific Ry. Co.,* v. *Abilene Cotton Oil Co.,* 204 U. S. 426 (1907); *Far East Conf.* v. *U. S.,* 342 U. S. 570 (1951); *Pennsylvania Ry.* v. *Day,* 360 U. S. 548 (1959). In these instances, it is natural to defer the primary interpretation of the law to the agency primarily responsible for administering it. Moreover, in such cases, the administrative agency's findings will normally determine the outcome of the court litigation.

However, when the remedy sought is outside the statutory scheme, or when the agency lacks the power to determine the question or award a remedy, this Court has held that the doctrine of primary jurisdiction has no application. *E.g., U. S.* v. *Radio Corp. of America,* 358 U. S. 334 (1959); *Eastern Ry.* v. *Littlefield,* 237 U. S. 140 (1915):

In the instant case, there is no concurrent jurisdiction by the court and the Environmental Protection Agency over the question presented. The action which defendant contends should be stayed is the District's common law nuisance action, seeking to abate defendant's pollution of the waters of Lake Michigan, to the detriment of the citizens of Chicago. A nuisance action

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is a traditional, well-defined remedy in pollution cases, and involves a determination of whether defendant's activities are unreasonably interfering with the waters within plaintiff's jurisdiction. *Barrington Hills Club* v. *Village of Barrington*, 357 Ill. 11 (1934); *City of West Frankfort* v. *Fullop*, 6 Ill. 2d 609 (1955). The determination of the issue, however, does not involve the same or similar factors as would be important in the Environmental Protection Agency's Hearings on whether a permit should be issued, *e.g.*, *Stanton* v. *Trustees of St. Joseph's College*, 233 A. 2d 718 (Me. 1967). Thus, numerous cases have held that the mere existence of an administrative agency charged with the responsibility for setting and enforcing pollution control standards does not vest such agency with primary jurisdiction and thereby preclude courts from abating pollution by means of the common law nuisance remedy. *E.g.*, *State of Florida ex rel. Shevin* v. *Tampa Elec. Co.*, 291 So. 2d 45 (Fla. App. 1974); *United States* v. *Rohm & Haas*, 500 F. 2d 167 (5th Cir. 1974); *State* v. *Dairyland Power Cooperative*, 52 Wisc. 2d 45 (1971); c.f., *Metropolitan Sanitary Dist.* v. *U. S. Steel Corp.*, 41 Ill. 2d 440 (1968).

More importantly, the ultimate decision by the Environmental Protection Agency will have no legal effect on the outcome of the common law nuisance decision. Even if the Environmental Protection Agency were to grant U. S. Steel the modified permit it seeks, that agency's findings and permit would in no way immunize the defendant from responsibility for the nuisance caused by its activities. *New Jersey* v. *New York*, 75 L. Ed. 1176 (1931); *People* v. *City of Reedley*, 226 Pac. 408 (Cal. App. 1924); *Commonwealth* v. *New York and Pennsylvania Co.*, 367 Pa. 40 (1951); *Barrington Hills Club* v. *Barrington*, 357 Ill. 11 (1934); *Druce* v. *Blanchard*, 338 Ill. 211 (1930).

As this Court said in *New Jersey* v. *New York*, 75 L. Ed. 1176, 1179 (1931):

> There is no merit in defendant's contention suggested in its amended answer, that compliance with the [federal]

> supervisor's permits in respect to places designated for dumping of its garbage, leaves the court without jurisdiction to grant the injunction prayed and relieves defendant in respect of the nuisance resulting from the dumping. There is nothing in the Act that purports to give one dumping at places permitted by the supervisor immunity from liability for damage or injury thereby caused to others or to deprive one suffering injury by reason of such dumping of relief that he otherwise would be entitled to have.

Similarly, in *People* v. *City of Reedley*, 226 Pac. 408, 409 (Cal. App. 1924), the Court held:

> [T]he permit by the State Board of Health, unrevoked at the time of the trial, is not a conclusive or absolute defense; that such a permit is only evidence that the State Board of Health has granted to the defendant city the privilege of discharging sewage effluent into the waters of Kings River under certain specific conditions provided for by the rules and regulations adopted by the State Board of Health and issued after the State Board of Health has satisfied itself that such sewage will not be injurious. Such a permit does not authorize a city to create or continue a nuisance or in any wise limit the power of the court to abate the same in the event it finds that a nuisance exists or is being created or continued under the complained authority of the permit.

The Illinois Supreme Court has clearly held that a permit from a regulatory agency will not bar a suit to enjoin the permittee from its pollution activities. In *Barrington Hills Club* v. *Village of Barrington*, 357 Ill. 11 (1934), the Court held that the prior administrative proceedings before the Sanitary Water Board (the predecessor to the Illinois Environmental Protection Agency), which resulted in a permit to dump sewage into a stream, did not prevent the Village of Barrington from enjoining the dumping by the permittee. Accord, *Druce* v. *Blanchard*, 338 Ill. 211 (1930).

The U. S. Environmental Protection Agency has no power or jurisdiction to resolve the issue of whether defendant is

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currently committing a public nuisance by its activities at Gary Works. Moreover, as the vast majority of cases have held, the fact that the Agency might find that its regulations are satisfied, and that a permit should be issued, cannot prevent the Illinois Court, applying traditional concepts of equity, from finding that defendant's acts constitute a nuisance. Therefore, a necessary factor for the application of primary jurisdiction is completely lacking.

C. The Resolution of Complicated and Technical Questions in Nuisance Cases Is, Historically and Actually, Well Within the Competency of a Court of Equity, Without the Need to Resort to Alleged Administrative Expertise.

One of the major purposes or reasons advanced for the doctrine of primary jurisdiction is to have the benefit of the expertise of administrative agencies in the resolution of technical factual questions. *U. S.* v. *Western & Pac. Ry.*, 352 U. S. 59 (1956).

It is well established, however, that the mere fact that evidence in a cause may be complicated or technical does not require deferring the case to the jurisdiction of an administrative tribunal.

Thus, in *U. S.* v. *Rohm & Haas*, 500 F. 2d 167 (5th Cir. 1974), the Court held that the complexity of the data necessary to decide a pollution nuisance case was not outside the competence of an equity court, and that the doctrine of primary jurisdiction did not require the plaintiff to first seek relief from the allegedly expert Environmental Protection Agency before proceeding.

The Court cogently observed:

> [T]he scientific, technical, and complex factual issues in the case bear on the kind of applicable relief that should be granted, rather than on whether the defendant is in violation of the Act. Discharges in violation of the Refuse Act may be completely halted by injunction and no reason

> appears why lesser steps may not be taken. (Citing cases). *The moulding (sic) of equitable relief, even in highly technical matters, is the proper concern of the courts.* Third, we agree with the United States that the data involved here is not inherently more complex than evidence routinely considered in anti-trust suits, patent actions and rate-settling adjudications. (500 F. 2d at 175).

In *State ex rel. Shevin* v. *Tampa Electric Company*, 291 So. 2d 45 (Fla. App. 1974), the Florida court also rejected an argument that the technical nature of the questions involved required deferring the matter to the expertise of the State Department of Pollution Control. The Court said that the mere fact that technical matters were involved in investigating defendant's activities and the methods for alleviating a nuisance did not require prior resort to administrative expertise. The Court further said that such considerations were irrelevant to an equity court's ability to decide if a nuisance existed and to fashion the necessary relief, for "certainly, the primary jurisdiction doctrine notwithstanding, highly technical matters per se are no strangers to the courts." (291 So. 2d at 48). See also, *State* v. *Dairyland Power Cooperative*, 52 Wis. 2d 45 (1971).

In the instant case, the question of whether defendant is or is not committing a public nuisance is no different than thousands of other nuisance suits which have preceded it in Illinois. The only difference may be that the nuisance defendant is charged with may be greater in degree. The trial judge has had vast experience in hearing pollution cases, and the parties will undoubtedly present expert testimony to aid the Court in its determination. (See *U. S.* v. *Rohm & Haas*, 500 F. 2d 167, 175 (5th Cir. 1974)). Equity courts have always been able to establish fair remedies in such matters.

Since there is no need to utilize the expertise of the U. S. Environmental Protection Agency, the second major purpose for the application of primary jurisdiction is missing, and the doctrine is therefore inapplicable.

BLEED THROUGH

CONCLUSION.

The clear policy of Congress has been to encourage and to stimulate state and local governments, as well as private citizens, to combat pollution by every means possible. While establishing broad federal regulations, Congress has nevertheless reiterated that such measures were not to be exclusive—that the states, local governments and courts were free to fashion diverse and stricter measures. The plaintiff, Metropolitan Sanitary District, has vociferously sought to protect the waters within its jurisdiction from contamination by industrial and private polluters, no matter where located.

However, if this Court were to accept defendant's position, there shall henceforth be only one uniform policy—that of the United States Environmental Protection Agency—to which all courts and governments must give deference. All proceedings instituted by public agencies and by private citizens would have to be brought initially before the United States Environmental Protection Agency, for its expert evaluation, and for a uniform interpretation. As shown above, such a conclusion does violence to the clear Congressional policy, and is in derogation of hundreds of years of equity jurisprudence in nuisance cases.

Moreover, acceptance of defendant's arguments will insure to it de facto immunity from local governmental control for many years, because of the automatic delay built into a system requiring initial resort to an agency, then to administrative review, before coming to an equity court for final relief. As Professor Bernard Schwartz has asked:

> Why should two actions have to be brought on what is really only one cause of action, when the court has the authority in the one proceeding to grant all the relief which is requested? Truly, to paraphrase Mr. Justice Frankfurter, this danger, if not likelihood, of thus marching the king's men up the hill and then marching them down

> again seems a mode of judicial administration to which one cannot yield concurrence.
>
> . . . Why should the plaintiff have to bring two actions on the one cause of action when the whole trend of our law, since the merger of law end equity, has been away from such facetious divisions of justice? *Primary Administrative Jurisdiction and the Exhaustion of Litigants*, 41 Geo. L. J. 495, 503-4 (1953).

The health and welfare of the citizens of Greater Chicago demand immediate protection, which only a court of equity can grant.

It is respectfully prayed that the defendant's Petition for Certiorari be denied.

Respectfully submitted,

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